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Memo

Date:	August 29, 2016
To:	SVC, Inc.
From:	Thomas R. Barker, Partner Ross Margulies, Associate
Regarding:	Ability of the Secretary of HHS to Approve an 1115 Waiver Containing a Community Engagement and Employment Initiative

You have asked whether or not section 1115 of the Social Security Act, 42 U.S.C. § 1315, gives the Secretary of Health and Human Services ("HHS") the authority to approve one particular provision of Kentucky HEALTH (Kentucky's 1115 demonstration project), as currently proposed.[1] In particular, you have asked whether or not HHS has the authority to approve an 1115 waiver containing a "community engagement and employment initiative."[2] We understand that under the proposed waiver, after three months of program eligibility, all able-bodied, working-age Kentucky HEALTH members will be required to participate in a community engagement activity, such as volunteer work, employment or job training, and job search activities, in order to maintain eligibility for Kentucky HEALTH. Based on our review of Federal law, regulations, and case law precedent, we believe there is no legal barrier to the Secretary approving a work-based eligibility requirement as part of an 1115 demonstration project.

I. Background

Section 1115 of the Social Security Act gives the Secretary of HHS authority to approve experimental, pilot, or demonstration projects that promote the objectives of a number of public assistance programs (including public health insurance programs such as Medicaid and CHIP). While state requirements under section 1902 of the Social Security

[1] See "Kentucky HEALTH: Helping to Engage and Achieve Long Term Health," available at http://chfs.ky.gov/NR/rdonlyres/A7F17FE3-7E2D-40EF-B404-5D8D12DB9EAB/0/62216KentuckyHEALTHWaiverProposal.pdf.

[2] In a letter dated June 21, 2016 and directed to former Kentucky Governor Steve Beshear, Secretary Burwell indicated that, in proposing an 1115 waiver, states "may [not] limit access to coverage or benefits based on work or other activities." Our best reading of this statement is that, in the Secretary's opinion, such a policy would be *unlikely* to "assist in promoting the objectives" of the Medicaid program, and thus not meet the criteria for an 1115 waiver. As discussed below, we believe this is a policy, not a legal, barrier.

Act (the Medicaid program) are mandatory upon the states, section 1115 of the Act provides a mechanism whereby such requirements may be waived in certain circumstances. In particular, section 1115 provides that:

> "In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [the public assistance title of the Act] in a State or States --
>
> (a) the Secretary may waive compliance with any of the requirements of section … 1902 … to the extent and for the period he finds necessary to enable such State or States to carry out such project …"

Social Security Act § 1115(a). The Secretary has, in the past, exercised extraordinarily broad authority in waiving specific provisions of the Medicaid program to permit states to use program funds in ways that are not otherwise allowed under Federal law,[3] so long as the Secretary determines that the initiative is an "experimental, pilot, or demonstration project" that "is likely to assist in promoting the objectives" of the Medicaid program.[4] Demonstration projects in the Medicaid program are typically approved through a series of negotiations between a state and HHS. As discussed below, Courts have historically been hesitant to intervene in the Secretary's determination of whether or not a particular project is worthy of a waiver, on the ground that "the only prerequisite to the exercise of [this] authority is that in the *Secretary's judgment*, the demonstration or experiment furthers the objects of the appropriate title of the Act."[5]

II. Analysis

At the outset and as a threshold matter, it is important to note that the waiver authority under section 1115 is broad, but not limitless. As it pertains to requirements under the Medicaid program, section 1115(a)(1) of the Social Security Act provides that

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[3] So broad is this authority that the Secretary has been willing to waive provisions outside of Section 1902, so long as they are "referenced" in 1902. "Authority of the Secretary of HHS to Approve Certain TANF Demonstration Programs Pursuant to Section 1115 of the Social Security Act," Congressional Research Service (September 4, 2012.) For example, the Secretary has in the past waived provisions in 1916 ("Maryland HealthChoice 1115 Waiver"), 1923 ("MaineCare Childless Adults 1115 Waiver") and 1905 ("MassHealth 1115 Waiver"), on the basis that these sections are referenced in (but not contained in) section 1902. Indeed, in cases where Congress has sought to limit the Secretary's use of waiver authority, it has inserted specific language for such purpose. See Social Security Act § 1924(a)(4)(A) ("In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1115, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this title.")

[4] See, e.g., Robin Rudowitz, Samantha Artiga, and Rachel Arguello, "A Look at Section 1115 Medicaid Demonstration Waivers Under the ACA: A Focus on Childless Adults," Kaiser Family Foundation, October 2013. See also Aguayo v. Richardson, 352 F. Supp. 462 (S.D.N.Y. 1927), aff'd., 473 F.2d 1090 (2d Cir 1973), cert. den., 414 U.S. 1146 (1974). See also Beno v. Shalala, 30 F.3d 1057, 1071 (9th Cir. 1994).

[5] Crane v. Matthews, 417 F. Supp. 532, 539 (N.D. Ga. 1976).

compliance with requirements listed in Section 1902, which generally comprise the provisions states must include in their Medicaid state plans, may be waived by the Secretary.[6] In addition, the Secretary may approve federal matching funds for expenditures that are not otherwise matchable under section 1903 under this waiver authority. The implication, therefore, is that *other* requirements of title XIX may not be waived.

In order to implement the community engagement and employment initiative, Kentucky seeks to waive section 1902(a)(10)(A) of the Social Security Act, to the extent necessary to require Kentucky HEALTH members, as a condition of eligibility, to complete specified community engagement hours.[7] Section 1902(a)(10)(A) generally details the eligibility criteria for Medicaid, including subclause (VIII), which provides for Medicaid eligibility to the so-called "expansion population." Because section 1115 generally permits the Secretary to waive any provision in section 1902, and because Kentucky seeks a waiver of 1902(a)(10)(A) (i.e. the eligibility criteria for the Medicaid population), on its face, Kentucky's waiver request is within the Secretary's statutory authority and may be granted.

As noted above, if the Kentucky HEALTH waiver is approved with a community engagement and employment initiative, the Secretary's decision to establish that waiver project could be challenged in court as a final agency action. With regard to the standards of judicial review of a final agency action that a court would likely use to evaluate whether the Secretary's action is valid, the Administrative Procedures Act states:

> "The reviewing court shall … hold unlawful and set aside agency actions, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"

5 U.S.C. § 706(2)(a). Thus, a court would likely assess whether the Secretary's decision to waive compliance with Section 1902(a)(10)(A) may be found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Courts have accorded considerable deference to the Secretary's establishment of experimental, pilot, or demonstration projects that, in the Secretary's judgment, are "likely to assist in promoting the objectives" of the Medicaid (or other applicable public assistance) program. For example, in Crane v. Mathews, 417 F. Supp. 532 (1976), the Northern District of Georgia refused to put a halt to a Georgia 1115 waiver which imposed copayment requirements on services otherwise exempted from copayments under the Medicaid statute. In Crane, the Court succinctly noted that: "it is not for the courts to deny the Secretary the

[6] There are a limited number of "unwaivable" provision in section 1902.

[7] We believe the state may also need to seek a waiver of section 1902(a)(17) ("comparability"), on the basis that the state is seeking to vary eligibility requirements among members.

right to approve a project merely because the Court might in certain situations disagree with his judgment."[8]

As explained at the beginning of this memorandum, section 1115's scope extends beyond the Medicaid and CHIP programs, to a number of different public assistance programs.[9] Therefore the scope of the Secretary's authority under section 1115 can be examined by looking at past actions in a variety of different public assistance contexts. For example, in the case of Aguayo v. Richardson, the Second Circuit upheld a waiver allowing the creation of a mandatory "workfare" demonstration project for Aid to Families With Dependent Children (AFDC, now TANF) recipients in New York, holding that section 1115 waiver decisions by the Secretary were valid so long as the Secretary had a "rational basis for determining that the programs were 'likely to assist in promoting the objectives' of [the Social Security Act]."[10] Courts reviewing the Secretary's authority to waive a particular provision under section 1115 will do so with great deference and only to "consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment."[11]

Consideration of these "factors" is key and this deference is not without its limits. While waivers have, in the not so distant past, been approved with little more than a short application, recent challenges to approved 1115 waivers by aggrieved Medicaid beneficiaries have highlighted the importance of establishing an administrative record during the approval process. In the case Beno v. Shalala, 30 F.3d 1057, 1069 (9th Cir. 1994), the 9th Circuit set forth three factors, tracking the statutory requirements in section 1115, that the Secretary must "examine" prior to approving a waiver. First, whether the project is an "Experimental, Pilot or Demonstration Project." Id. Second, whether the project is "Likely To Assist in Promoting The Objectives Of The Act." Id. Third, "the extent and period" for which she finds the project is necessary. Id. at 1071.

Thus, in cases where a court encounters an "insufficient" administrative record, the court is more likely to set aside the agency's action as arbitrary and capricious. Compare C.K. v. Shalala, 883 F. Supp. 991, 994 (D. N.J. 1995) (finding the Secretary's approval of an 1115 waiver was not arbitrary and capricious on the basis that "(1) the materials before the Secretary were sufficient for her to at least consider the pertinent issues and that (2) there was no clear error of judgment on her part") with Newton-Nations v. Betlach, 655 F.3d 1066 (9th Cir. 2011). In Newton-Nations, the 9th Circuit reviewed a challenge by Arizona Medicaid recipients against Arizona and HHS for approving an 1115 waiver which increased cost-

[8] *Crane at* 539.

[9] "In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives *of title I, X, XIV, XVI, or XIX, or part A or D of title IV*…" Section 1115(a) of the Social Security Act (emphasis added).

[10] Aguayo, 473 F.2d at 1105.

[11] C.K. v. Shalala, 883 F.Supp. 991, 1004 (D. N.J. 1995), affirmed, C.K. v. New Jersey Dept. of Health and Human Services, 92 F.3d 171 (3rd Cir. 1996).

sharing for childless adults. The 9th Circuit concluded that because the administrative record in the case consisted of "one statement in [a] 2004 retroactive approval letter," the Secretary's review of the proposed copay changes waiver did not satisfy the waiver test to determine whether the proposal was likely to further the goals of the Medicaid program.

Assuming that the Secretary generally complies with the procedures for reviewing an 1115 waiver application, the actual determination of whether or not the demonstration "assist[s] in promoting the objectives" of the Medicaid program is generally a policy decision, not a legal one. The Medicaid statute contains no definition of the "objectives" of the Medicaid program, and CMS has adopted no regulatory definition or written guidance to that end.[12] Indeed, the only statutory language that does offer some insights into the overall goals of the Medicaid program is at section 1901, and this language explicitly cites the statutory goal of helping beneficiaries "attain or retain capability for independence."[13] A community engagement and employment initiative arguably supports the broad goal of attaining independence.

Outside of the language at section 1901, CMS has (since late 2015) offered four broad criteria on its website that the agency states that it uses to determine whether or not Medicaid program objectives are met:

1. increase and strengthen overall coverage of low-income individuals in the state;

2. increase access to, stabilize, and strengthen providers and provider networks available to serve Medicaid and low-income populations in the state;

3. improve health outcomes for Medicaid and other low-income populations in the state; or

4. increase the efficiency and quality of care for Medicaid and other low-income populations through initiatives to transform service delivery networks.

See https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/1115/section-1115-demonstrations.html. The U.S. Government Accountability Office, as recently as April 2015, called out these criteria as "not sufficiently specific to allow a clear understanding of what HHS considers to be approvable Medicaid

[12] In an April 2015 GAO report entitled, "Medicaid Demonstrations: Approval Criteria and Documentation Need to Show How Spending Furthers Medicaid Objectives," GAO-15-239, CMS declined to respond to the GAO's recommendation that the agency adopt written guidance on waiver criteria.

[13] See Social Security Act § 1901.

purposes."[14] Thus, the decision as to whether or not a particular waiver promotes the "objectives" of the Medicaid program is a broad policy decision vested in the Secretary.

But even if evaluated under this framework, the community engagement requirement is consistent with the objectives of Medicaid. Given that the criteria are separated by the word "or," it seems obvious that Kentucky's waiver proposal need be consistent with only one of the criteria in order to be approvable. The Kentucky HEALTH waiver (including the community engagement element) is certainly consistent with the third criterion insofar as a primary focus of the waiver is to improve the health and health outcomes of the population served by the Medicaid program. Even the inclusion of the community engagement requirement in the waiver is entirely consistent with this criterion as the waiver specifically cites academic research that demonstrates a positive link between employment status and better health outcomes. It seems clear, then, that nothing in the Kentucky proposal is inconsistent with any of the four criteria and is in fact directly consistent with arguably the most important of them. Therefore, we believe that the Secretary could easily exercise her policy discretion and approve the waiver.

III. Conclusion

It is clear from our reading of the authority granted to the Secretary in section 1115 that HHS *can* approve an 1115 waiver containing a community engagement and employment initiative on the ground that section 1115 permits the Secretary to waive the Medicaid eligibility requirements if, "in the judgment of the Secretary," such a waiver is likely to promote the objectives of the Medicaid program. Recent court precedent indicates that courts are likely to grant deference to an agency's decision to approve such a waiver, so long as the administrative records shows that the agency considered the relevant factors (here, whether the waiver is for an experimental, pilot or demonstration project, and whether or not the waiver promotes the objectives of the program.) Section 1115 ultimately vests in the Secretary ("in the judgment of the Secretary") the authority to make such a determination.

[14] See GAO-15-239. The report also notes: "Even if HHS were planning to issue the four criteria noted in its response, they are no more specific than the broad policy approaches currently described on HHS's website and therefore would be insufficient to inform stakeholders of the agency's interpretation of its section 1115 authority."